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Supreme Court, U.S.
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No. 85-919

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1985

RONALD A. GILLESPIE,

Petitioner,

v.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN AND THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN.

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT M. HESSLINK, JR.
Attorney for Petitioner
6200 Gisholt Drive
Madison, WI 53713
(608) 221-3151

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Most of the arguments advanced by the state in its brief have been adequately addressed in the petition itself. However, the respondent advances four arguments which require

further clarification. We address these arguments in turn.

ARGUMENT

I. THE DEFENDANT FAILED TO REBUT THE PETITIONER'S ASSERTION THAT THERE IS A CONFLICT AMONG THE CIRCUITS.

The state attempted to show that Easley v. Anheuser- Busch, Inc., 758 F.2d 251 (8th Cir. 1985) is not inconsistent with the holding below. We relied, in part, on Easley to demonstrate that the burden is more properly placed on the employer in a Title VII case to show that alternative selection procedures advanced by the plaintiff are unsatisfactory.

There are two reasons why this argument should not preclude consideration by certiorari. First, a fair reading of Easley, and the case law

on which it relied, shows that the Court of Appeals for the Eighth Circuit did effectuate the shift in the burden of proof which we advanced. Thus, Easley is contrary to the decision below and also at odds with Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

Second, even if the state had shown that Easley was not inconsistent, it nevertheless failed to address the other case law that we cited in support of the same proposition. E.E.O.C. v. St. Louis-San Francisco Railway Company, 743 F.2d 739, 742 (10th Cir. 1984); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981); Horace v. City of Pontiac, 624 F.2d 765, 769 (6th Cir. 1980) each demonstrate that a plaintiff in a Title

VII case should not be required, in order to meet the third prong of the disparate impact test, to develop an alternative selection device, validate it, and prove that it would not have had a significant disparate impact on minorities.

The state has therefore not rebutted our assertion that there is a conflict among the circuit courts on the amount of evidence necessary for a plaintiff to establish a reasonably available alternative selection mechanism.

II. THE PLAINTIFF'S EVIDENCE ESTABLISHED THE EXISTENCE OF REASONABLE, LESS DISCRIMINATORY ALTERNATIVE TESTS.

The main thrust of the state's argument is that plaintiff did not identify an alternative selection device

that would not have presented an equal risk of disparate impact. If the state argues that the plaintiff did not independently develop an alternative examination, validate it, and then administer it to a body of qualified applicants to determine if it had an equally undesirable disparate impact, it is correct. However, whether that level of proof is required is precisely the question which the petition seeks to place before the Court.

The plaintiff did introduce unrebutted evidence that other types of examinations were available and would have generally created less disparate impact than the type of examination in question. We showed, in fact, that some were actually favored by the state's own

published policies on selection procedures.

Where several examinations have a disparate impact, the one with the lesser impact should be selected. See Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980); Contreras v. City of Los Angeles, supra.

This showing by the plaintiff should have required the defendant to come forward with evidence that those selection devices did not meet its objective of obtaining qualified applicants. The courts below, therefore, erred in concluding that plaintiff had not met his burden under the third prong of the test.

III. WHETHER THE DEFENDANT CONSIDERED OTHER TESTING ALTERNATIVES IS IRRELEVANT.

The state argued that it met its obligation with respect to the reasonable alternative standard because it considered, in the abstract, using other types of selection devices. Although the EEOC Guidelines require the consideration of alternatives, 29 C.F.R. §1607.3, those Guidelines do not provide that the mere consideration of alternatives will shield an employer from liability under Title VII where the alternative selected is actually discriminatory.

Thus, while the state met its procedural obligation to consider more than one test, the question presented is whether the test finally chosen was discriminatory under Title VII.

IV. TITLE VII IS DIRECTED AT THE ERADICATION OF DISCRIMINATION.

In response to our contention that the standards applied below do not further the objectives of Title VII, the state asserts that the "interests" of Title VII are primarily concerned with the employer's interests in hiring the most qualified employees available. While the hiring of qualified applicants is certainly a consideration, that interest must be considered as part of the overall goal of Title VII to eliminate discrimination in the work place.

The real goal of Title VII is to enable employers to secure qualified applicants in a manner which does not discriminate.

As the Ninth Circuit Court of Appeals has stated, Title VII is directed at the eradication of discrimination by employers. Silver v. KCA, Inc., 586 F.2d 138 (9th Cir. 1978); see also Bradington v. International Business Machines Corp., 360 F.Supp 845 (D.C. Md. 1973), affirmed 492 F.2d 1240 (4th Cir.).

The burden of proof adopted by the courts below allows the employer to secure qualified applicants. However, because it imposes requirements that are impossible for a Title VII plaintiff to meet, it fails to require that an employer secure the applicants in a manner that imposes the least disparate impact on minority candidates. It effectively eliminates the third prong of the disparate impact test.

Given the competing interests inherent in Title VII, this Court should consider whether this method of allocating the burden of proof is consistent with the broad, and sometimes conflicting, objectives of Title VII.

CONCLUSION

This Court should grant the petition for certiorari and review the decision below on the important questions presented.

Dated this 15th day of January, 1986.

Respectfully submitted,

ROBERT M. HESSLINK, JR.

Attorney for Petitioner

6200 Gisholt Drive
Madison, WI 53713
(608) 221-3151